Editor's note: 91 I.D. 108

ANN LORENTZ COAL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-613
IBSMA 81-13

Decided February 9, 1984

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement from a decision by Administrative Judge Tom M. Allen vacating Notice of Violation No. 79-I-37-2 for lack of jurisdiction over a tipple facility. CH 0-85-P.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite -- Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With -- Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Decisions of the Interior Board of Surface Mining and Reclamation Appeals established a two-part test for determining whether an offsite facility was conducting surface coal mining operations, as defined in the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, by requiring that the facility be operated in connection with a surface coal mine and that it be located at or near the minesite. However, court decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be

operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, and that facility must be located at or near the minesite.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite -- Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"At or near a minesite." A coal loading facility is "at or near a minesite" within the meaning of surface coal mining operations in 30 CFR 700.5 where it operates on the same permit area as the minesite or it is physically integrated with the minesite to the extent that any potential or actual environment damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation.

APPEARANCES: William F. Larkin, Esq., Susan A. Shands, Esq., and Marcus P. McGraw, Esq., for the Office of Surface Mining Reclamation and Enforcement; David Rexroad, Esq., Buckhannon, West Virginia, Henry McC. Ingram, Esq., R. Henry Moore, Esq., Pittsburgh, Pennsylvania, for Ann Lorentz Coal Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On October 23, 1980, the Office of Surface Mining Reclamation and Enforcement (OSM) filed a petition for discretionary review of the September 24, 1980, decision of Administrative Law Judge Tom M. Allen vacating Notice of Violation No. 79-I-37-2, and holding that OSM had no jurisdiction over the tipple facility of Ann Lorentz Coal Company, Inc.

(Lorentz). The Board of Surface Mining and Reclamation Appeals (IBSMA) granted the petition on November 13, 1980. 1/

On October 3, 1979, an OSM inspector visited the Lorentz tipple facility in Upshur County, West Virginia. Pursuant to the authority of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (Supp. V 1981), he issued a notice of violation charging Lorentz with two violations of the interim performance standards set forth in 30 CFR Part 700. Violation 1 charged a failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds in violation of 30 CFR 715.17(a). Violation 2 cited a failure to meet the numerical effluent limitations for total suspended solids as set by 30 CFR 715.17(a).

Following an assessment conference, OSM determined that no civil penalty should be imposed. Nevertheless, Lorentz filed a petition for review, principally challenging OSM's jurisdiction over its facility. Following the presentation of evidence at a hearing, the Administrative Law Judge vacated the notice, ruling that OSM had no jurisdiction over the Lorentz tipple facility.

[1] The initial issue raised by this appeal is whether the activities conducted at the tipple constituted "surface coal mining operations" as defined by the Act and regulations. Surface coal mining operations were defined in the regulatio

ns at 30 CFR 700.5 (1979) in part as follows: 2/

1/ On Apr. 26, 1983, the Secretary issued Secretarial Order No. 3092 abolishing IBSMA and transferred and consolidated the functions of that Board with the Interior Board of Land Appeals. 48 FR 22370 (May 18, 1983).
2/ On May 5, 1983, the Department published final rules, effective June 6, 1983, changing the regulatory definition of "surface coal mining operations." 48 FR 20392 (May 5, 1983). See discussion, infra.

> (a) Activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include excavation for the purpose of obtaining coal, * * * in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine-site * * *. [3/ Emphasis added.]

In its decisions IBSMA developed a two-part test to determine whether or not an offsite coal processing or loading facility was a "surface coal mining operation" within the definition. IBSMA held that an offsite facility must be operated "in connection with" a surface coal mine and must be located "at or near" the minesite. 4/ However, the Department, by regulation, has concluded that the phrase "at or near the minesite" modifies only "loading of coal for interstate commerce."

In the development of the regulations for the permanent regulatory program, OSM attempted to clarify its interpretation that the phrase "at or near the minesite" used in the statutory definition of "surface coal mining operations" modifies only "loading of coal." It was stated in the preamble to those regulations: "The Office interprets the Act as setting no territorial limit on its jurisdiction over other facilities identified in the statutory definition preceding 'loading of coal.'" 44 FR 14901, 14915 (Mar. 13, 1979). Subsequently, this interpretation was upheld in In re: Permanent Surface

3/ The quoted regulatory definition is with only minor changes the same definition as set forth in the Act at section 701(28), 30 U.S.C. § 1291(28) (Supp. V 1981).

4/ See, e.g., Reitz Coal Co., 3 IBSMA 260, 88 I.D. 745 (1981); Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980); Virginia Iron, Coal and Coke Co., 2 IBSMA 165, 87 I.D. 327 (1980).

Mining Regulation Litigation, No. 79-1144 (D.D.C. May 16, 1980) (Slip Op. at 51-53). See also Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1094 (6th Cir. 1981).

Since the OSM interpretation was contained only in the preamble to the permanent program regulations and no change was made in the actual regulatory definition relating to the interim program, IBSMA continued to apply the two-part test. However, in Debord v. Watt, No. 82-99 (E.D. Ky. Sept. 29, 1982), the court reversed IBSMA's decision in Dinco Coal Sales, Inc., 4 IBSMA 35, 89 I.D. 113 (1982), that an offsite processing facility must be "at or near a minesite" for OSM to have regulatory authority over its activities. 5/

On May 5, 1983, the Department adopted a final rule, inter alia, revising the definition for "surface coal mining operations." 30 CFR 700.5 now provides in pertinent part:

> Surface coal mining operations means --
>
> (a) Activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include excavation for the purpose of obtaining coal * * *; in-situ distillation, retorting, leaching, or other chemical or physical processing; and the cleaning, concentrating, or other processing

5/ The Federal court suit in Debord was brought by 16 individuals who lived near the Dinco Coal Sales, Inc., facility. Both the Secretary of the Interior and Dinco Coal were named defendants. Dinco Coal filed an appeal from the district court decision. Dinco Coal Sales, Inc. v. Debord, No. 82-5617 (6th Cir. filed Oct. 12, 1982). We note that the district court decision in Debord appears to be based on its conclusion that the Dinco facility was operated in connection with "mines"; however, the Administrative Law Judge's decision in Dinco specifically found that the facility was not operated in connection with a surface coal mine. The IBSMA majority opinion made no finding on that issue.

> or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. [Emphasis added.]

48 FR 20392, 20400 (May 5, 1983).

For purposes of resolving the initial issue in this case, we find that the test of whether a facility is a surface coal mining operation does not always involve two parts. The test now requires that the activities be scrutinized. If a facility engages in excavation for the purpose of obtaining coal, in situ distillation, retorting, leaching, or other chemical or physical processing or the cleaning, concentrating, or other processing or preparation of coal, and those activities are conducted in connection with a surface coal mine, that facility is involved in surface coal mining operations regardless of its physical distance from the surface coal mine. On the other hand, if a facility engages only in the loading of coal for interstate commerce, it is a surface coal mining operation only if loading is conducted on the surface of lands in connection with a surface coal mine, and the facility is located at or near the minesite. 6/

6/ Under the regulations published May 5, 1983, 48 FR 20392, 20400-401, OSM provided new permanent program definitions for "coal processing" and "coal preparation plant." In the preamble to those regulations, it was stated:

> "'Coal preparation' or 'coal processing' has been defined to mean the cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities. Under this definition, coal loading, crushing, sizing and other such activities do not constitute coal processing or preparation unless they result in the separation of coal from its impurities."

48 FR 20394 (May 5, 1983; emphasis added).

We note that no attempt to distinguish between a coal preparation or processing facility and a coal loading facility was made by the district court in Debord v. Watt, supra. It described the operation as "a coal processing facility * * * which crushes and loads coal produced from coal mines in the surrounding area."

Thus, in order to be conducting surface coal mining operations, offsite processing facilities need only be operated in connection with a surface coal mine, while loading facilities must be operated in connection with a surface coal mine and be located at or near the minesite.

We must examine the facts in this case to determine if Lorentz was conducting surface coal mining operations. Lorentz operates a tipple which receives coal by truck from several mines. Coal is crushed and loaded at the tipple into railroad cars that enter interstate commerce (Tr. 60). The facility is a "dry" tipple where no washing or other processing of the coal occurs (Tr. 7). It covers approximately 2 to 3 acres (Tr. 7).

Dale Riggs is a 50 percent owner of Lorentz (Tr. 57) and serves as its president (Tr. 59). He receives no salary, but he does receive dividends on his stock when the company makes a profit (Tr. 58). Riggs is also a 50 percent owner of Galloway Company, which owns and operates the nearest mine, the Galloway surface mine. Riggs is a salaried employee of Galloway and serves as its secretary/treasurer (Tr. 57-58). He testified that he is "generally in charge" of Galloway's operations (Tr. 38), and that he is the overseer for both the Galloway mine and the Lorentz tipple (Tr. 66).

It is approximately 600 yards from the Galloway permit area to the Lorentz tipple facility (OSM's Exh. A; Tr. 10, 21). Riggs testified that "a while back he measured the distance from the Galloway pit" to the Lorentz "coal bin" as approximately 2-1/2 miles (Tr. 42). The mine and the tipple are not connected by any conveyor belts or private roads (Tr. 32, 41-42, 45). Coal is delivered to the tipple over public roads (Tr. 45).

Since 1974 all Galloway coal has passed through the Lorentz tipple (Tr. 61, 62). In 1978, 48 percent of the coal tippled at the Lorentz facility came from the Galloway surface mine. For 1979 that figure was 34 percent. Riggs estimated that for 1980 the amount was approximately 40 percent (Tr. 51, 61). Galloway owns and maintains a truck garage and an office trailer on the Lorentz tipple site (Tr. 15, 54). Galloway's permits and authorizations to mine are kept in the trailer at the tipple site (Tr. 66-67). There is occasional sharing of equipment and manpower between the companies but, in such cases, the company using the other company's equipment or personnel is charged for that use (Tr. 54-55, 62-65).

The evidence in this case shows that the Lorentz tipple operates in connection with the Galloway surface coal mine. Riggs, the president of
Lorentz, is a 50-percent owner of both Lorentz and Galloway. He is a salaried employee of Galloway and is generally in charge of its operations.

The following testimony was given by Riggs with respect to his capacity at the two operations:

Q And you just kind of overall, you run the Galloway job?

A They handle the details. I have been -- they handle the details. I try to oversee as best I can.

Q Do you oversee any of the employees on the Ann Lorentz tipple?

A I don't, this is the same way. They handle the details, but I oversee Ann Lorentz tipple.

Q Okay, so you are kind of, I guess, for lack of a better term, the overseer for both the Galloway surface mine job and the Ann Lorentz tipple?

A I try to keep my eye on both. There is no money involved.

(Tr. 65, 66).

The record clearly demonstrates that the operations at both the surface mine and the tipple were under the control of Riggs. Operating decisions by him with respect to one were binding upon the other. The operating connection between the mine and the tipple was the management by Riggs. The evidence also reveals that the Lorentz tipple crushes and loads coal for interstate commerce. Accordingly, we cannot sustain Judge Allen's finding that the tipple is not operated in connection with the Galloway mine.

We now turn to the question of whether the Lorentz tipple is "at or near the mine site." Since the tipple is not "at" the minesite, we will focus on whether it is "near" the Galloway mine. We conclude that it is not.

As countless judicial opinions have proclaimed (rather unnecessarily), "near" is a relative term. See cases collected in 28 Words and Phrases 141 (1955). It may fairly be said that Japan is "near" China, while a marksman's bullet which misses the bullseye of a target by 10 feet cannot be regarded as "near" the intended point of aim. "Near," being a relative term, the proper import of the word is dependent upon the sense and connection in which it is used, considered together with the purpose to be accomplished. J. W. Kelly & Co. v. State, 132 S.W. 193, 201 (Tenn. 1910); Kilgore v. Jackson, 118 S.W. 819, 821 (Tex. Civ. App. 1909).

It is obvious that in the surface mining context not all facilities for the loading of coal were intended to fall within the definition of surface coal mining operations presumably because such a facility, operated independently and in isolation from a mine, cannot rationally be said to be a "surface coal mining operation." Therefore, a series of words of limitation were used in an effort to identify the narrow category of loading operations which would be included in the definition of surface coal mining operations. First, the loading has to be of surface-mined coal. Second, the loading facility has to be operated "in connection with" a surface coal mine. Third, the loading must be for the purpose of shipment in interstate commerce. Fourth, the loading facility must be "at or near" the site of the mine with which it is connected.

Thus, these limitations reveal a concern for geographic proximity between the surface coal mine and the loading facility. However, this concern raises the question of what possible difference would it make if a loading facility was "at or near" the minesite or remote from it? We must conclude that the intention of limiting the scope of the definition to those loading facilities which operate in connection with a surface mine and at or near the minesite was based upon a recognition that some surface coal mines are integrated operations in which the mine operator not only extracts the coal, but processes and loads it for interstate commerce. All these activities might be conducted at the minesite, or it might be necessary or convenient to load the coal from another site on adjacent land or in close proximity to the mine. Because the entire process in such instances constitutes a single, integrated operation under the same supervision, it would be

difficult to define what functions were not part of the "surface coal mining operations" addressed by the Act and what functions were, and to try to apportion any resultant environmental degradation between the regulated and unregulated activities "at or near" the minesite. It also would be extremely difficult, and perhaps futile, to impose the regulatory requirements on only part of such an operation.

But if the loading operation were far removed from the minesite, there would be no difficulty in identifying the regulated "surface coal mining operations" as distinguished from simple loading operations which are not "surface coal mining operations" and, therefore, beyond the purview of the regulations, because they are segregated by significant distance even though the mine and the tipple might be "connected" by common ownership or management.

[2] "At or near the mine site," then, should be construed to include a loading facility which operates on the same permit area as the minesite or a loading facility which is physically integrated with the minesite to the extent that any potential or actual environmental damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation. In other words, the loading facility would be perceived as part and parcel of the minesite operations. See Reitz Coal Co., 3 IBSMA at 269, 88 I.D. at 749 (concurring opinion). 7/

7/ We find support for this approach in the permanent program regulations published May 5, 1983, 48 FR 20392. Therein, the Department defined "support facilities" as "those facilities resulting from, or incident to, an activity in Paragraph (a) of the definition of 'surface coal mining operations identified in § 700.5 of this chapter and the areas upon which such facilities are located. Support facilities may consist of, but need not be limited to, the following facilities: * * * coal loading facilities; * * *." 48 FR 20401.

In this case there is testimony from the OSM inspector that the Galloway permit area is approximately 600 yards from the Lorentz tipple facility. However, the most critical evidence bearing on the "at or near" question is found in Exhibit A in the case record and in the testimony that the road distance from the extraction activities to the tipple itself is approximately 2-1/2 miles. Exhibit A is an aerial photograph depicting a rather broad valley. The valley floor, running east and west, is traversed by a watercourse and a four-lane public highway. The Galloway mine itself is not in the picture, but in the foreground, in the heights of the south side of the valley, is shown the Galloway mine sedimentation pond and a state road which leads down the slope, crosses the watercourse, and connects with the

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fn. 7 (continued)

The following relevant commentary appears in the preamble to the regulations to explain the rationale for including coal loading facilities within the definition of support facilities:

"Some commenters were confused by OSM's treatment of coal loading facilities. They observed that coal loading facilities were specifically listed as regulated activities under the Act, but that OSM had included coal loading as an activity in the proposed definitions of coal processing plant and support facilities. OSM's regulation of these facilities is neither unintentional nor duplicative. When a loading plant is operated at or near a coal mine, it will be regulated under the permit for that mine. Statutory authority for this situation is provided in Sections 701(28)(A) and 701(28)(B) of the Act. In that context, it will be subject to the same performance standards as other support facilities. When not at or near a mine, a coal loading facility will only be regulated if it is part of or results from or is incident to a regulated coal preparation plant or other regulated activity under Section 701(28)(A). * * *

"Commenters suggested that phrase 'coal loading facilities,' in the definition of support facilities should be modified by the addition of the phrase 'at or near the mine site' to reinforce the fact that coal loading has a geographical limitation. This comment has been rejected. Although Section 701(28)(A) of the Act provides an independent basis for regulating loading facilities at or near the mine site, Section 701(28)(B) also provides authority for regulating such facilities. However, to be regulated under Section 701(28)(B) a facility must result from or be incident to an activity regulated under Section 701(28)(A). Thus, regulated support facilities will naturally occur in proximity to the site of a Section 701(28)(A) operation." 48 FR 20396.

highway. Upon entering the highway, one would turn left (west) and proceed for some distance (undisclosed) to the intersection on the right with another public road. This road leads up the north side of the valley to -- and apparently around -- the site of the Lorentz tipple, which appears in the photograph.

Thus, even though the mine permit area may be 600 yards from the tipple area, the reality is that the mine and the tipple are not physically integrated. There is no link, such as a private haul road, a tramway, or a conveyor system, between the mining activity and loading site. 8/ Instead, coal from the Galloway mine must be trucked down the south slope of the valley, along the valley floor highway, then up the road ascending the valley's north slope, a distance of 2-1/2 miles, much of it over public roads.

The separation of the two facilities on opposite sides of the valley by such a distance is a sufficient basis to determine that their respective operations are not physically integrated. It is clear that the mine and the tipple are not part of the same operation, to the extent that effective regulation of the mine would require regulation of the tipple. We find that the Lorentz tipple is not at or near the site of the Galloway surface mine and conclude that Lorentz was not conducting "surface coal mining operations" within the meaning of the regulations. 9/

8/ We do not mean to imply that one of the examples given in the text must be found before a facility may be considered to be "at or near the mine site." However, such a link would be persuasive evidence of physical integration.
9/ We note that under the permanent program regulations published May 5, 1983, 48 FR 20392, the Lorentz tipple would be regulatable as a "support facility." See note 7, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, and 48 FR 22370 (May 18, 1983), the decision of Administrative Law Judge Allen is affirmed as modified herein.

Bruce R. Harris
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge.